245 U. S. 54, 38 Sup. Ct. 40. As the Supreme Court has refused to apply the same rule to intangible property that is applied to tangible property, the decision in the instant case is sound.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE BY PLAINTIFF.—The plaintiff, a driver, sued to recover the compensation stipulated in a contract with a school district for the transportation of teachers and pupils to and from school for a period during which school was closed by order of the State Board of Health because of an epidemic. The case was tried and submitted upon the theory that the driver was entitled to recover, if at all, the stipulated compensation as upon performance. *Held,* two justices dissenting, for the defendant. *Sandry* v. *Brooklyn School Dist. No.* 78 (N. Dak. 1921) 182 N. W. 689.

Since there was no actual performance in the instant case, there could be no recovery in *indebitatus assumpsit* for work, labor and services as upon a performance. But in every contract there is a promise implied not to do anything to prevent the other party from performing and for breach of this promise damages may be recovered. *Patterson* v. *Meyerhoffer* (1912) 204 N. Y. 96, 97 N. E. 472. Such damages are measured by the contract rate less what the plaintiff might have earned elsewhere had he sought similar employment with reasonable diligence. *Howard* v. *Daly* (1875) 61 N. Y. 362. Here, the plaintiff's performance became impossible because of the defendant's act in closing the schools, and the question arises whether, if the suit had been tried on the proper theory, there might have been a recovery. It has been held that no deduction can be made from a teacher's salary where a school is closed during the term on account of an epidemic. *Gear* v. *Gray* (1894) 10 Ind. 428, 37 N. E. 1059. But most of these cases go on the ground that the teacher has been required by the school to hold herself in readiness to teach. *Libby* v. *Inhabitants of Douglas* (1900) 175 Mass. 128, 55 N. E. 808. The teacher has in some cases, however, been denied recovery. *School Dist. No.* 16 *of Sherman County* v. *Howard* (1904) 5 Neb. 340, 98 N. W. 666. And this seems in accord with the generally accepted rule that where the performance of a promise becomes impossible because of a change in the domestic law or by order of the executive, the performance is excused. *Miller* v. *Taylor* [1916] 1 K. B. 402 (*semble*). This rule would preclude a recovery in the instant case for breach of the implied promise.

CRIMINAL LAW—BURGLARY—INDICTMENT—VARIANCE.—In an indictment for burglary, ownership and possession were laid in S the owner of the store. S had been injured and E, a clerk, had assumed complete control of the business. *Held,* a variance. Possession should have been laid in E. *Ratcliff* v. *State* (Tex. 1921) 229 S. W. 857.

To constitute a good indictment for larceny the thing stolen must be charged to be the property of the actual owner, or of a person having a special property interest. *The People* v. *Bennett* (1867) 37 N. Y. 117. The existence of a special property interest in a bailee does not prevent the allegation of property in the general owner. *Barnes* v. *The People* (1856) 18 Ill. 52. In an indictment for larceny from an agent, an allegation of property in either the real owner or the agent, is sufficient. *Lowry* v. *State* (1904) 113 Tenn. 220, 81 S. W. 373; *Commonwealth* v. *Blanchette* (1892) 157 Mass. 486, 32 N. E. 658. It is insufficient, however, to charge it to be the property of a mere servant. *State* v. *Jenkins* (1878) 78 N. C. 478. The relation of master and servant exists whenever the employer retains the right to direct "not only what shall be done, but how it shall be done." See *Singer Mfg. Co.* v. *Rahn* (1889) 132 U. S. 518, 523, 10 Sup. Ct. 175. As a servant has mere custody of goods which he has received from his

master his conversion of them is larceny. *Holbrook* v. *State* (1894) 107 Ala. 154, 18 So. 109. But it is not larceny for a servant to convert goods delivered to him by a third person for his master, provided he does so before he becomes a mere custodian. *Commonwealth* v. *King* (Mass. 1852) 9 Cush. 284. A Texas statute providing that property may be alleged in either the general or special owner has been peculiarly interpreted to mean that the property must be laid in the one having the actual care, control and management. See *Frazier* v. *State* (1885) 18 Tex. App. 434, 442. So while the instant case is sound under the Texas law, it would not be under the law of most states.

CRIMINAL LAW—NEW TRIAL—INCOMPETENCE OF ATTORNEY.—At the trial at which the defendant was convicted, evidence favorable to him was not introduced because of the apparent lack of ability of his counsel. On appeal, *held,* the inconclusiveness of the evidence together with the incompetence of the counsel was sufficient grounds for a new trial. *People* v. *Schulman* (Ill. 1921) 132 N. E. 530.

New trials in criminal cases should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. See *State* v. *Nelson* (1903) 91 Minn. 143, 145, 97 N. W. 652. Where the evidence presented was insufficient to warrant the conviction a new trial is granted. *People* v. *Freeman* (1910) 244 Ill. 590, 91 N. E. 708. Within the discretion of the court, newly discovered evidence is sufficient justification for a new trial. *Saylors* v. *State* (1911) 9 Ga. App. 227, 70 S. E. 975. But where the evidence could have been discovered or presented by usual diligence on the part of a defendant's attorney a new trial is refused. *White* v. *State* (1906) 98 S. W. 264; *Edwards* v. *Territory* (1904) 8 Ariz. 342, 76 Pac. 458; *Lyons* v. *State* (1912) 6 Okla. Cr. 581, 120 Pac. 665. The incompetence of the defendant's attorney is not sufficient basis for a reversal. Thus in the jurisdiction of the principal case the court refused to reverse a conviction of murder for the alleged incompetence of defendant's counsel in offering no proof of defendant's good character and in not asking for instructions on self-defense and accidental homicide. *People* v. *Barnes* (1915) 270 Ill. 574, 110 N. E. 881; *accord, Edwards* v. *Territory, supra.* The inconclusive nature of the evidence in the principal case may have been sufficient ground for the decision; but it is difficult to see how the incompetence of defendant's attorney was material.

INFANTS—RESCISSION OF EXECUTED CONTRACT—BENEFITS RECEIVED THEREUNDER.—The plaintiff, an infant, representing he was an adult purchased an automobile, paying part of the contract price. After using it for five months he sued to recover the money paid. *Held,* dismissing complaint, that since the benefit that the plaintiff derived exceeded the sum paid, he could not recover. *Sparandera* v. *Staten Island Garage* (Mun. Ct. 1921) 66 N. Y. L. J. 52, *aff'd* (Sup. Ct. App. T. 1921) 66 N. Y. L. J. 32.

It was recently held that when an infant disaffirms an executed contract for the purchase of stock and seeks to recover money paid by him to the broker under the contract, the plea that the infant had fraudulently misrepresented his age, is good. *Falk* v. *McMasters* (1921) 197 App. Div. 357, 188 N. Y. Supp. 795; see (1922) 22 COLUMBIA LAW REV. 78. Since, according to the New York decisions the infant derives no benefit from such a stock transaction, the plaintiff there would probably have recovered if the theory of the defense was the benefit accruing to the infant under the contract. *Mordecai* v. *Pearl* (N. Y. 1892) 63 Hun. 553, 18 N. Y. Supp. 543, *aff'd* 136 N. Y. 625, 32 N. E. 1014; *cf. Pierce* v. *Alexander* (1902) 36 Misc. 870. Even in the absence of misrepresentation, infants have been denied recovery of money paid on executed contracts, because the benefits